BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES HURRELBRINK	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,964
CUSTOM LAID CONCRETE	)	
Respondent	)	
AND	)	
	)	
CALIFORNIA INDEMNITY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated February 18, 1999. The Administrative Law Judge granted claimant temporary total disability compensation and medical treatment, finding that respondent and its insurance carrier had failed to prove claimant's accident was caused or contributed to by claimant's consumption of alcohol.

ISSUES

Was claimant's accident on December 8, 1998, contributed to by claimant's consumption of alcohol, in violation of K.S.A. 1998 Supp. 44-501(d)(2)?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record, the Appeals Board finds that the Order of the Administrative Law Judge should be reversed.

K.S.A. 1998 Supp. 44-501(d)(2) states in pertinent part:

> The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which

> are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. . . . It shall be conclusively presumed that the employee was impaired due to alcohol if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more.

Claimant suffered accidental injury at approximately 8:00 p.m. on December 8, 1998, when, while helping finish a concrete floor in a basement, claimant fell from 9 to 12 feet into the basement, landing on the floor, breaking his collar bone. Witnesses at the scene testified that claimant did not lose consciousness but did suffer substantial injuries. Claimant was transferred by the Lawrence-Douglas County Fire & Medical Department to the Lawrence Memorial Hospital, where he was treated by Dr. Kimberly McLain and Dr. Stephen Myrick.

Even though, by all witness reports, claimant did not lose consciousness, claimant has no recollection of any events between just before the fall and the time he alleges he awoke in the emergency room at Lawrence Memorial Hospital. During the ride to the hospital, claimant was described as combative and uncooperative, and was moving around.

At the emergency room, claimant was initially examined by Dr. McLain, who described claimant as smelling very strongly of alcohol and very uncooperative in answering questions. Dr. McLain diagnosed a fall, acute alcohol intoxication and a clavicle fracture of the right shoulder. Claimant was also examined by Dr. Myrick, the surgeon on call. Dr. Myrick also diagnosed a fractured right clavicle, a right upper eyelid hematoma and inebriation.

Blood tests performed approximately two hours after claimant's accident registered .267 mg/dl. Dr. Myrick estimated that claimant's blood alcohol at the time of the accident would have been approximately .280. Claimant acknowledges drinking six or seven beers during the work period prior to the fall, but denies being inebriated.

While K.S.A. 1996 Supp. 44-501(d) obligates that certain procedures be followed before the results of the chemical tests can be admitted into evidence, in this instance, the parties stipulated at the time of preliminary hearing to the blood tests. The Appeals Board, therefore, finds that claimant had a blood alcohol level of between .267 and .280 at the time of the accident.

Also admitted into the record was a written statement from Mark Edmonds, the owner of respondent Custom Laid Concrete, dated February 15, 1999. In that written statement, Mr. Edmonds describes the accident and how, in his opinion, the drinking did not contribute to claimant's accident. Mr. Edmonds did not believe claimant was impaired

in any way from the consumption of alcohol, but instead fell as a result of problems associated with working a construction site at 8:00 p.m., in the dark.

A review of the statement submitted by Mr. Edmonds indicates he did not observe the claimant fall, but merely discovered claimant had fallen after the accident when they heard his cries for help from the basement. It is noted that claimant is the nephew of Mr. Edmonds, and had been working for him off and on for approximately nine months prior to the accident. It is uncontradicted that claimant drank with respondent employer's permission, and that drinking on the job in the evenings was a regular practice with this respondent.

In 1993, the Kansas Legislature amended K.S.A. 44-501(d) to its current version. However, prior to July 1, 1993, the language of the statute was significantly different and stated in pertinent part:

> If it is proved that the injury to the employee results . . . substantially from the employee's intoxication, any compensation in respect to that injury shall be disallowed.

The current language of the statute, which creates a conclusive presumption of impairment if the employee has an alcohol concentration of .04 or more, was not in the pre-July 1, 1993, version of K.S.A. 44-501.

When considering disputes dealing with intoxication and the effect of that intoxication on a worker's right to collect workers' compensation benefits, the language modification created by the Legislature in 1993 becomes determinative. Under the prior version, the Kansas Appellate Courts, on several occasions, considered the effect of a claimant's intoxication on that claimant's right to collect benefits. In both Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995), and Poole v. Earp Meat Co., 242 Kan. 638, 750 P.2d 1000 (1988), the Kansas Supreme Court discussed a worker's consumption of alcohol, and the effect on that worker's right to collect benefits.

> To defeat a workers' compensation claim based on claimant's intoxication, an employer must prove not only that the claimant was intoxicated, but that such intoxication was the substantial cause of the injury.
>
> . . . The presumption of intoxication provided for under the Kansas criminal statute is inapplicable in workers' compensation cases. Evidence of the blood alcohol concentration of a workers' compensation claimant is relevant to the issue of the cause of the accident in which the claimant is injured, but does not give rise to a presumption of intoxication.

Poole, *supra*, at 638; *see also* Kindel, *supra*, at 285.

Here, the legislative emphasis is dramatically different than that in both Kindel and Poole. The 1993 modifications to K.S.A. 44-501 modified the substantial contribution language to the "was contributed to by" current version. This indicates a definite legislative intent to reduce the burden on respondents claiming alcohol contribution to an accident. In addition, the Legislature created a conclusive presumption of impairment with alcohol concentrations of .04 or more. Here, claimant's alcohol concentration at the time of the accident was almost .280, nearly seven times the statutory conclusive presumption level.

Finally, the Appeals Board must consider the opinion of Michael J. Poppa, D.O. In his February 15, 1999, letter, Dr. Poppa discussed the Lawrence Memorial Hospital emergency room admissions report of Dr. McLain, the history and physical examination report of Dr. Myrick, the Lawrence-Douglas County Fire & Medical Department patient report from the ambulance, and lab reports from Lawrence Memorial Hospital regarding claimant's ethanol level. Dr. Poppa concluded:

> Mr. Hurrelbrink's work related injury involving a slip and fall with resultant impairment was directly and causally contributed to by his significantly elevated ethanol level. To put this in better perspective, Mr. Hurrelbrink's blood alcohol level is six times over the accepted level for worker's compensation statutes and is four times over the legal driving limit.

In the Order granting compensation, the Administrative Law Judge stated that the respondent and insurance carrier failed to prove the accident was caused or contributed to by claimant's consumption of alcohol. The Administrative Law Judge went on to say that, while there was little dispute that claimant was drinking, the employer permitted the practice of alcohol consumption and denied alcohol caused the accident.

This statute does not consider whether alcohol caused the accident, but whether alcohol contributed to the accident. In addition, the statute does not discuss the employer's practice of allowing alcohol on the job.

In considering the entirety of the evidence, the Appeals Board finds that claimant's consumption of alcohol did contribute to claimant's injuries, and under K.S.A. 1996 Supp. 44-501(d)(2), respondent is not liable for the resulting injuries.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated February 18, 1999, should be, and is hereby, reversed, and claimant is denied benefits for the injuries suffered on December 8, 1998.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

c: Sally G. Kelsey, Lawrence, KS
Donald J. Fritschie, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director